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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SERGIO TORRES, Defendant and Appellant.	B207131 (Los Angeles County Super. Ct. No. NA074548)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Sergio Torres appeals from the judgment entered following a jury trial in which he was convicted of two counts of corporal injury to a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)). He was sentenced to prison for ten years and contends the court prejudicially erred when, over defense objection, it instructed the jury with the mutual combat instruction.[1] For reasons stated in the opinion we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Isabella Medina was very close to her sister, Alexandra Navarro, and talked to her almost daily. Ms. Navarro married appellant on April 27, 2007, and a couple of weeks thereafter, Ms. Medina was unable to contact her. On May 24, 2007, after being unable to reach her for approximately one and one-half weeks, Ms. Medina went to Ms. Navarro's apartment and saw that Ms. Navarro had a black eye and sores and bumps on her forehead. Ms. Navarro also had other bruises that appeared older. Ms. Navarro's three children looked frightened and Medina took them away from the apartment. Medina asked Navarro to accompany her but Navarro refused. Navarro's apartment was a mess. Normally everything was well organized, but that day "everything was thrown" and there was broken glass.

When Medina returned to the apartment about two and one-half hours later, appellant was leaving in his car. Navarro had another black eye and bruises and "knots" on her head, legs, back, arms, and chest. Navarro said she was in pain, frightened of appellant, and that she "couldn't take it anymore." Medina took Navarro and her three children away from the apartment.

Prior to the marriage, Ms. Navarro had had a four-year relationship with another man. Appellant was jealous of this relationship and accused Navarro of cheating with this man and with other men. During the first part of May when Navarro was driving with appellant and after she made a comment about the man with whom she previously

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[1] He also contended the trial court erred in limiting his presentence credits to 15 percent, but the parties now agree the trial court has corrected this error.

had had a relationship, appellant "smacked [Navarro] across [her] face and . . . ear." Appellant apologized and said he would never do that again.

Sometime thereafter, appellant got angry at Navarro because someone called on her cell phone. Appellant struck her and "smacked" her across the face on her right side. He socked her "hard on [her] head" in front of her children. He threatened to have his "gangster female friends" beat her up. Navarro and appellant went to the bedroom and, while she was on top of the bed, appellant socked her "with rage." He pounded her on her head, face and body, causing a black eye and bruises all over her body. Navarro felt like she was being hit with a baseball bat. Navarro tried to defend herself but could not.[2]

On another occasion, appellant accused Navarro of sleeping with a man who lived in an apartment downstairs. Appellant and Navarro argued. Navarro grabbed an iron, wanting to throw it at appellant out of frustration, but appellant grabbed it from her. On another occasion, appellant and Navarro were arguing and she threw a porcelain coffee cup at him, hitting him on the temple. She had only intended to scare him. There was redness on his temple which was gone the next day.

Appellant had taken Navarro's cell phone away from her and she, therefore, had been unable to talk to her family members for awhile. On May 24, when Medina appeared at Navarro's apartment, Navarro was embarrassed because of all her bruises. After Medina took the children away from the apartment, Navarro attempted to work things out with appellant. She tried to be intimate with him and while on the bed, appellant stated someone was hiding under the mattress and told Navarro to bring him a knife. Appellant cut the mattress and pulled it apart. Navarro took the knife away from appellant. Appellant wanted the knife back and wanted Navarro to stand behind him. She told appellant "you're crazy" and started walking towards the living room. Appellant responded, "How dare you. Why didn't you back me up. Why aren't you defending your husband." As Navarro walked toward the living room, appellant "raged towards [her]." Navarro knew appellant was going to hit her so she grabbed a lamp to defend

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[2] This incident involving the cell phone call was the subject of count 2.

herself. Appellant "had that raged look" and took the lamp away from her and put it down. Appellant got angrier because Navarro was "going to use the lamp on him to defend [herself.]" Appellant "started pounding on [her] head, pounding [her], socking [her with a closed fist] from head to toe." Navarro tried to get away but appellant followed her. She dropped to the floor and appellant continued to sock her hard everywhere. When Navarro told him to stop and that she had had enough, appellant finally stopped hitting her.[3] Navarro sustained more bruises, a "busted" upper lip and another black eye.

On June 11, 2007, appellant was arrested. He had a black eye and stated he had received it from a fight about three or four days before. The arresting officer did not ask appellant with whom he had had the fight. Appellant also told a nurse at the jail dispensary that he had had a fight two days before. It was the opinion of the nurse that the bruise was two to six days old.

In defense, appellant testified he was shocked and angry when Navarro called him by her ex-boyfriend's name after she and appellant had just had sex. Appellant later answered Navarro's cell phone and got upset when he heard a man's voice and the man would not give his name. Thereafter, Navarro hit appellant with a plastic hanger, "whacking [him], [and] provoking [him]." She then hit him on the left cheek with an iron. Appellant slapped Navarro. He did not slap her trying to get the iron, but rather blocked her kicks and swings while she was holding on to the iron. He was angry and "lost control after she hit [him]." Navarro kicked him and he blocked the kicks while trying to take the iron out of Navarro's hands. He also blocked her swings. Appellant claimed after Navarro hit him with the iron, he slapped her because she had provoked him. Navarro grabbed a vase, approached appellant and swung at his face. Appellant took the vase away and Navarro fell to the floor. During the confrontation, appellant never hit her with a closed fist. He slapped her only once after she hit him with the iron. The bruises on Navarro's arms and legs were from when appellant "blocked" Navarro's

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[3] This event was the subject of count 1.

swings and kicks. They could also have been appellant's handprints from when he was trying to take control. Appellant admitted that after this incident Navarro suffered a black eye and "started to get like redness." He stressed she had only one black eye because he only hit her once.

On May 24, when appellant told Navarro he was leaving, Navarro hit him on the cheek with a closed fist. She hit him just once and appellant slapped her once on the mouth with an open hand, injuring her lip. He hit Navarro in retaliation because she hit him first. Navarro picked up a glass vase and swung it at appellant's face. Appellant put his hand up to protect himself and the vase hit his hand, cutting it. When appellant started bleeding, Navarro stopped.

DISCUSSION

I

The trial court gave instructions on self-defense,[4] including an outdated version of CALJIC No. 5.56, which told the jury that self-defense was not available to a person who

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[4] The jury was instructed pursuant to:

CALJIC No. 5.30, "It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, that person may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

CALJIC No. 5.50, "A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

CALJIC No. 5.51, "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if that individual so confronted acts in

engaged in mutual combat unless certain requirements were met.[5] In arguing to the court that the instruction was appropriate, the prosecution stated, "should the jury determine that [appellant and Navarro] are in an argument; they are in a fight; someone is hitting someone, and someone responds by hitting them back. That is a mutual combat."

Appellant asserts there was not sufficient evidence to support the instruction, the court failed to define the phrase mutual combat, and that the instruction misstated the law.

A trial court "has a duty to instruct as to defenses '"that the defendant is relying on . . . if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case."' [Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) "Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] At the same time, instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the

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self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

CALJIC No. 5.52, "The right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When the danger ceases to appear to exist, the right to use force in self-defense ends."

CALJIC No. 5.55, "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense."

[5] CALJIC No. 5.56 provides, "The right of self-defense is only available to a person who engages in mutual combat: [¶] 1. If he has done all the following: [¶] A. He has actually tried, in good faith, to refuse to continue fighting; [¶] B. He has by words or conduct caused his opponent to be aware, as a reasonable person, that he wants to stop fighting; and [¶] C. He has caused by words or conduct his opponent to be aware, as a reasonable person, that he has stopped fighting; and [¶] D. He has given his opponent the opportunity to stop fighting. [¶] After he has done these four things, he has the right to self-defense if his opponent continues to fight."

case. [Citation.]' [Citation.]" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.)

CALJIC No. 5.56 "affords the right of self-defense to a mutual combatant only after, inter alia, he has informed his opponent that he has stopped fighting and given his opponent the opportunity to stop." (*People v. Quach* (2004) 116 Cal.App.4th 294, 300.)

In *People v. Ross* , *supra*, 155 Cal.App.4th 1033, the court discussed the theory of "mutual combat" questioning "[w]hat distinguishes 'mutual' combat from combat in which one of the participants retains an unconditional right of self-defense[.]" (*Id.* at p. 1044.) The court observed, "[t]he mutuality triggering the doctrine inheres not in the combat but in the *preexisting intent to engage in it.* Old but intact caselaw confirms that as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities.*" *(Id.* at p. 1045*)* The court concluded, "that 'mutual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*" (*Id.* at pp. 1046-1047.)

In the instant case there was no evidence from which the jury could reasonably find that appellant and Navarro actually consented or intended to fight before the claimed occasion for self-defense arose and instructing the jury pursuant to CALJIC No. 5.56 was error.

Appellant asserts the error was prejudicial and that his claim of self-defense was so crippled that the error must be evaluated under the standard of *Chapman v. California* (1967) 386 U.S. 18. Respondent counters that when an instruction that correctly states the law is erroneously given because it has no application to the case, it is subject to the harmless error analysis articulated in *People v. Watson* (1956) 46 Cal.2d 818. We conclude that under either standard, the error was harmless. Apart from appellant's claim

that some of Navarro's injuries were caused when he "blocked" her, appellant admitted with reference to count 2 that, after Navarro hit him with a plastic hanger and hit him on the cheek with an iron, he "lost control" and hit her. She "provoked" him with the hanger and he slapped her causing Navarro to suffer a black eye. Evidence that appellant lost control and hit Navarro in retaliation is not evidence that appellant's use of force was in self-defense. Further, with reference to the incident on May 24, the subject of count 1, appellant testified he slapped Navarro in the mouth, injuring her lip not as an exercise of self-defense, but in retaliation because she hit him first. That is not evidence of self-defense.[6] Because even under defendant's version of events he inflicted traumatic injury on Navarro under circumstances not amounting to self-defense, we conclude that the error was harmless under both *Watson* and *Chapman*.

DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.

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6 In view of our holding, it is unnecessary to reach the issues of whether the trial court erred in failing to define the term mutual combat or whether the instruction misstated the law.